Supreme Court, U. S.
FILED
JUL 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Petitioner*,

v.

ALLAN BAKKE, *Respondent*

BRIEF OF AN AMICUS CURIAE

FOR: Timothy J. Hoy

Submitted by:
Daniel T. Spitler
131 E. Court St.
Bowling Green, OH 43402

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

I. Defining who is eligible for aid is essential in any assistance program 7
   A. . . Definition of What Constitutes Disadvantage is Necessary in the Davis Program 8
   B. As Davis Defines Disadvantage, Economic and Educational Deprivation are Irrelevant 9

II. Specific racial definitions are necessary in any program that invidiously discriminates on the basis of race 10
   A. Who is Black? 11
   B. Who is an American Indian? 13
   C. Defining Other Classifications 14
   D. Self-designation Foments Fraud 16

III. Racial classifications without workable definitions are *per se* unconstitutional if they invidiously discriminate 17

IV. Congress never intended the Civil Rights Act of 1964 to serve as a basis for quotas and forced racial balances 18

CONCLUSION 19

APPENDIX A 21

APPENDIX B 22

TABLE OF AUTHORITIES

Cases: Page

Bakke v. Regents of the University of California, 18 Cal. 3d 34; 553 P.2d 1152; 132 Cal. Rptr. 680 (1976) 3, 5, 8-10, 16-18

Bates v. Little Rock, 361 U.S. 516 (1960) 17

DeFunis v. Odegaard, 416 U.S. 312 (1974) 3, 4

DiLeo v. University of Colorado, No. 75-2280-2 (jurisdiction accepted by Colorado Supreme Court June 3, 1976) 16

Page

International Brotherhood of Teamsters v. United States, No. 75-636 (decided May 31, 1977) 11
Katzenbach v. Morgan, 384 U.S. 641 (1966).....17
Lau v. Nichols, 414 U.S. 563 (1974) 17
McGowan v. Maryland, 366 U.S. 420 (1961)..... 4
Morrison v. California, 291 U.S. 82 (1934) 14
N.A.A.C.P. v. Button, 371 U.S. 415 (1963).....17
Nofire v. United States, 164 U.S. 657 (1897) 14
Stanley v. Illinois, 405 U.S. 645 (1972)..... 5
State v. Treadway, 52 So. 500 (La. 1910).....11
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).....17
Winters v. New York, 333 U.S. 507 (1948) 17

Regulations:
25 U.S.C. § 452 (1970) 13
78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V) 18

Miscellaneous:
Bittker, THE CASE FOR BLACK REPARATIONS, (1973).....11
Brief of Amici Curiae for the Committee on Academic Non-Discrimination and Integrity and the Mid-America Legal Defense Foundation, in Regents of the University of California v. Allan Bakke, No. 76-811 (filed Feb. 16, 1977)..... 7
Brief of Amici Curiae for Sanford Kadish et al., in Regents of the University of California v. Allan Bakke, No. 76-811 (filed Feb. 11,1977) 3
Bunzel, "Bakke v. Regents of the University of California," COMMENTARY, 59 (March 1977) 7
Clark, Remarks, 110 Cong. Rec. (1964) 18,19
Cohen, HANDBOOK OF FEDERAL INDIAN LAW, (4th ed. 1945).....14
Elliot, "Reverse Discrimination: The Balancing of Human Rights," 12 WAKE FOREST L. REV. 852 (1976).... 7

Page

Flaherty and Sheard, "DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas," 12 DUQUESNE L. REV. 745 (1974)..... 7
Funke, "Educational Assistance and Employment Preference: Who Is an Indian?," 4 AM. INDIAN L. REV. 1 (1976).....12,13
Jefferson, Letter to John Adams, (June 24, 1813)..... 6
Lavinsky, "DeFunis v. Odegaard: The 'Non-Decision' With a Message," 75 COL. L. REV. 520 (1975) 19
THE NEW YORK TIMES, February 6, 1975 at 29, col. 5.....16
THE NEW YORK TIMES, March 29, 1977 at 30, col. 4 .....1a
THE NEW YORK TIMES, Apr. 28, 1977 at 1, col. 4..... 2
THE NEW YORK TIMES, May 1, 1977, § 1, at 33, col. 1 6
O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," 80 YALE L.J. 699 (1971) 5, 6
Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," 1974 S. CT. REV. 1 7,9,14,16
Truesdell, THE INDIAN POPULATION OF THE UNITED STATES AND ALASKA (1937) 14
United States Dep't of Agriculture, Food and Nutrition Service, pamphlet No. 1123..... 8
United States Dep't of Commerce, Bur. of the Census, 1970 CENSUS OF THE POPULATION—SUBJECT REPORTS—LOW INCOME POPULATION, (1973)..... 9
United States Dep't of Commerce, Bur. of the Census, UNITED STATES CENSUS OF THE POPULATION: 1970—DETAILED CHARACTERISTICS, (1973)..... 9
United States Dep't of Commerce, Bur. of the Census, NEGRO POPULATION: 1790-1915, (1918).....12
United States Dep't of Health, Education, and Welfare, Social Security Administration, pamphlets Nos. (SSA) 76-10035; (SSA) 77-10029 and; (SSA) 76-11000 8

Page

University of California, Berkeley, Boalt Hall School of Law, Memorandum to 1976-1977 Applicants 2a
Van Den Haag, "Reverse Discrimination: A Brief Against It," NATIONAL REVIEW, 492 (Apr. 29, 1977)..... 7
Van Woodward, THE STRANGE CAREER OF JIM CROW, (Oxford, 1957) 12
THE WASHINGTON POST, June 11, 1977, at 1, col. 4 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Petitioner*,

v.

ALLAN BAKKE, *Respondent*

BRIEF OF AN AMICUS CURIAE

FOR: Timothy J. Hoy

INTEREST OF THE AMICUS*

The amicus is a senior in college and will be applying to law school in the fall of 1977. As a prospective applicant to professional school, the amicus has a direct interest in the

---

* The Amicus wishes to thank Professor Thomas LeDuc of Oberlin College whose invaluable guidance and criticism made this brief possible. Also Casceil and Lin who offered such good advice.

outcome of this case even though it concerns only the admissions policy of the Davis Medical School. The impact of the Court's decision could greatly influence the amicus' acceptance or rejection to law school and thus his career.

The amicus questions the sincerity of the Davis Medical School and other state institutions of higher learning who voice their commitment to increasing the number of minority doctors and lawyers but place the burden of achieving this goal on innocent individuals, such as Allan Bakke, solely because of their race. If Davis and the State of California are sincere in their desire for more minority professionals, they have various options such as increasing the number of seats in the school, open admissions, pre-admission tutoring, and, as the California Supreme Court suggested, a preferential admissions program for the economically or educationally disadvantaged of all races. None of these procedures would violate the equal protection rights of applicants on the basis of race.

One of the most objectionable aspects of the Davis program is that it purports to be a preferential program for the "disadvantaged," while using only one criterion for determining whether the applicant is or is not disadvantaged—race. A poor white applicant from rural California with uneducated parents or a white orphan is not disadvantaged under the Davis definition, but a black applicant who enjoyed a first-rate secondary and undergraduate education usually is.[1] It is not blacks or

1. Other institutions have programs similar to the one at Davis, the result of which has been not to appreciably increase the number of minority members matriculating in medical school, but often to shift them around from "black" schools to schools with better reputations in the academic community. An example is found in The New York Times, Apr. 28, 1977, at 1, col. 4, which shows that the seven medical schools of New York City, all of which have had "affirmative action/reverse discrimination" admissions programs for a varying number of years, have not had very good luck with their programs:

> Despite seven years of efforts aimed at increasing minority group enrollment in the seven medical schools in New York City to at least the national average, the schools have with one exception fallen even further behind. . . . This pattern of decline follows national trends.

Latinos who are underrepresented in our nation's professional schools, it is the economically and socially poor of all races. While it is true that a greater percentage of blacks, for example, can be classified as disadvantaged,[2] a large number of whites fall into this category as well. Disadvantage is colorblind.

To say that members of selected minorities should be given preference in admission because of their disadvantaged backgrounds while at the same time urging denial of preference to whites who can also show a background of disadvantage[3] is not only legally illogical, it is tantamount to saying that certain minorities are inherently inferior to the majority. As Justice Douglas said in his dissent in *DeFunis v. Odegaard* (416 U.S. 412, 343 (1974)), "One assumption must be clearly disapproved; that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer."

Another assumption inherent in the Davis program is that all whites are monolithic. Thus the Davis program puts disadvantaged whites—many Greek, Slavic, and Italian-Americans, for example—whose ethnic groups are also underrepresented in our medical schools at a double disadvantage, for they are not allowed to participate in the special admission program.

The amicus will soon be participating in the type of admissions process that is being challenged in this case. The amicus

2. Determining disadvantage could be based on statistics such as parental education or income.

3. *See*, Brief of Amici Curiae for Sanford Kadish, et. al., in *Regents of the University of California v. Bakke*, No. 76-811 (filed Feb. 11, 1977), at 28. If all members of certain races are unable to compete because all have been educationally deprived then we must ask the question: When does such preferential treatment end? If four years of college cannot eradicate this disadvantage will it be overcome by the time the student graduates from medical school? Is the next step to relax medical licensing procedures?

does not oppose preferential admissions for the disadvantaged. He opposes the idea that disadvantage honors a color line. He opposes the notion that all Cubans, for example, are disadvantaged and that no whites are. The amicus asks no more than to let his and the applications of *every* other applicant who cannot prove disadvantage stand or fall on their merits—grade-point average (G.P.A.), Law School Admission Test (LSAT) or Medical College Admission Test (MCAT) score, recommendations from professors, and other criteria which the schools themselves have empirically established as indicative of meriting or not meriting admission.[4] Because Allan Bakke is white, he could not compete for every seat in the first-year class at the Davis Medical School. Being white meant that his already slim chances for admission were further lowered 16 percent, for 16 of the seats in the class were closed to Bakke and to every other white regardless of relative qualification. The state has a compelling interest, indeed an obligation, to provide for its citizens the most competent lawyers and doctors it can. The Davis Medical school voluntarily relies primarily on G.P.A. and MCAT scores to make admission decisions. Davis feels that applicants with high marks in these two categories stand the greatest chance of being successful in medical school. If Davis questions the validity of the criteria it has chosen to use, it should change the criteria for every applicant. Davis' racially segregated admissions policy, "creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions."[5]

4. There are exceptions to this, such as a preferential program for residents of the state in which the school is located. Such a program is not based on race or any other traditionally suspect category and can usually satisfy the "rational relationship test" which the Court has established for non-suspect classifications. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961).

5. Douglas, J., dissenting in *DeFunis v. Odegaard*, 416 U.S. 312, 343.

The admissions committee at Davis Medical School has a right to decide which criteria to use in judging applicants. Allan Bakke is not challenging this. He is challenging the double-standard of judgment based solely on race that Davis has used since 1969 in making its admissions decisions.[6] Proponents of the "special admission" program at Davis often attack the use of the MCAT as having a disproportionately adverse impact on blacks and other minorities. But few of the advocates of this program favor the abolishment of aptitude tests as Justice Douglas did in *DeFunis*.[7] When dealing with an applicant pool of 3,737 that must be pared to 100, it is much easier to reduce the pool to a manageable size by using test scores and G.P.A.'s to summarily reject applicants below certain scores, than to rely on soft data.[8] However, as Justice Brennan said in *Frontiero v. Richardson*:

> [A]lthough efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality.[9]

Furthermore, the MCAT and other tests of the Educational Testing Service can probably be shown to have a disproportionately adverse impact on lower income people of all

6. Tobriner, J., dissenting in *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 64; 553 P.2d 1152, 1172; 132 Cal. Rptr. 680, 700 (1976).

7. 416 U.S. 312, 340.

8. Interviews, recommendations, etc.

9. Brennan, J., opinion in *Frontiero v. Richardson*, 411 U.S. 640, 677 (1973). Brennan cites *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Robert O'Neil stated that "because of the fiscal and physical constraints" a general disadvantage program would be impossible. Brennan's statement in *Frontiero* is a good answer to O'Neil's argument. O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," 80 YALE L.J. 699, 746 (1971).

races as well as individuals from certain parts of our country. There are problems with aptitude tests, but they are not limited to race.[10]

Merit, virtue and talent, what Jefferson called the "natural aristocracy among men,"[11] should be the sole criterion for determining admission, not the fulfillment of a quota. Denying a more qualified applicant—more qualified according to the criteria the school itself has chosen—admission because of past societal discrimination which the individual had nothing to do with attacks the very roots of the American belief in the primacy of the rights of the individual.

Some, such as Robert O'Neil of Indiana University at Bloomington, have argued that those majority applicants who are denied admission because of preferential admissions were only marginally qualified to begin with.[12] This is wrong. There are so many students currently applying to medical and law school that only a small percentage ever actually matriculate in professional school.[13] Even without racially discriminatory programs, many qualified applicants must be turned away each year. The intense competition for admission to professional school makes it even more essential, in the opinion of the amicus, that each qualified applicant be given all possible consideration. Denying admission to a qualified applicant because of the applicant's race does not help end racial discrimination, it foments it.[14]

Many of the inequities of the Davis special admission program and similar programs have been adequately and elo-

10. Geographic background and wealth are not suspect categories as is race, but when passing judgment on these tests, problems such as these should not be ignored.

11. Jefferson, Letter to John Adams, (June 24, 1813).

12. O'Neil, 80 YALE L.J. 699, 738.

13. *See, e.g.*, Statistical Summary of Applications, Admission and Enrollment 1965-1975, in Brief of Amici Curiae for Sanford Kadish *et. al.* See note 3, *supra.*, at 10.

14. *See, e.g.*, The New York Times, May 1, 1977, § 1 at 33, col. 1 and; The Washington Post, June 11, 1977, at 1, col. 4. The latter concerns "affirmative action" at the Justice Department.

quently discussed by others.[15] But, there are problems which, while serious, have been virtually ignored by both sides of the case. This brief hopes to address the vagueness, lack of definitions, and related overbreadth of the preferred classifications. For purposes of such an assistance program a working definition of those to be preferred is necessary. Self-designation of race, when the applicant knows that inclusion in one group may be helpful while inclusion in another may be harmful invites fraud. When a constitutionally guaranteed right such as equal protection is being abridged as is the case in *Bakke*, specificity is essential.

I.
DEFINING WHO IS ELIGIBLE FOR AID IS ESSENTIAL IN ANY ASSISTANCE PROGRAM

The administration of any assistance program requires a workable definition of which individuals are eligible for the assistance. Both the Food Stamp program and Social Security, for example, publish guidelines that explain who is eligible.[1] While lack of personnel often forces these programs to accept an applicant's claim of penury, age qualification, or disability without checking its validity, investigation procedures do exist. Imagine the fraud which would arise if our federal government decided to award welfare benefits to anyone considering themselves "poor." Self-designation of this nature, coupled with a lack of any definition of who is "poor," since individu-

15. *See generally*, Bunzel, "*Bakke v. Regents of the University of California*," COMMENTARY, March 1977, at 59; Van Den Haag, "Reverse Discrimination: a Brief Against It," NATIONAL REVIEW, Apr. 29, 1977, at 492; Brief of Amicus Curiae of the Committee on Academic Non-Discrimination, in *Regents of the University of California v. Bakke*, No. 76-811 (filed Feb. 16, 1977); Flaherty and Sheard, "*DeFunis*, the Equal Protection Dilemma: Affirmative Action and Quotas," 12 DUQUESNE L. REV. 745 (1974); Elliot, "Reverse Discrimination: The Balancing of Human Rights," 12 WAKE FOREST L. REV. 852 (1976); Posner, "The *DeFunis* Case and the Constitutionality of Preferential Treatment of Racial Minorities," 1974 S. CT. REV. 1 and; Appendix A.

al ideas of what constitutes being poor can vary greatly, would mean chaos. A high rate of fraud would be but one of the problems engendered by such a program. The special admission program at the Davis Medical School has not produced chaos. But the problems with the Davis program are analogous to this hypothetical situation.

A. A Definition of What Constitutes Disadvantage is Necessary in the Davis Program

The special admission program at Davis was charged with filling 16 of the 100 available first-year places in the medical school. Officially, the program was intended to assist "disadvantaged" applicants.[2] Because the special admission program at Davis granted considerable assistance to those eligible, in some cases admission to medical school which would not have been possible without the assistance,[3] it is important to have a workable, or what Richard A. Posner calls "an operational definition of membership in the favored group."[4]

1. For a definition of eligibility for the Food Stamp program, see pamphlet No. 1123 of the United States Department of Agriculture Food and Nutrition Service. For Social Security definitions of eligibility see pamphlet No. (SSA) 76-10035; (SSA) 77-10029 and; (SSA) 76-11000 of the Social Security Administration of the United States Department of Health, Education, and Welfare.

2. Allan Bakke applied to Davis Medical School in both 1973 and 1974:

> In 1973 the application form inquired whether the applicant desired to be considered by a special committee which passed upon the applications of persons from economically and educationally disadvantaged backgrounds. [The following year a revised form was adopted due to the university joining the Medical College Application Service whose prescribed form Davis began to use. In 1974,] instead of the question relating to disadvantage, the applicant was asked whether he "describes" himself or herself as a "White/Caucasian" or a member of some other identifiable racial or ethnic group"

Specifically, "Black/Afro-American, American Indian, Mexican-American or Chicano, Oriental/Asian-American, Puerto Rican (Mainland), Puerto Rican (Commonwealth), Cuban, or Other." The applicant could then indicate whether he wished to be considered an applicant from a minority group (*Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 40; 553 P.2d 1152, 1156; 132 Cal. Rptr. 680, 684 (1976)). While racial classifications were used in 1974, the special admission material was still called "Program to Increase Opportunities in Medical Education for Disadvantaged Citizens."

B. As Davis Defines Disadvantage, Economic and Educational Deprivation Are Irrelevant

Economic and educational deprivation appear to be irrelevant to determining disadvantage at Davis.[5] How does the Davis Medical School define disadvantage? Most poor people, poor as the Commerce Department defines the term, are white.[6] But a white orphan who attends a state university only because he was able to receive a full scholarship is not disadvantaged under the Davis definition. Nor is the daughter of a poor Slavic-American truck farmer from rural California. An affluent Chinese-American, however, with a degree from Stanford is disadvantaged as Davis defines his term. The child of the Governor of Puerto Rico could also be classified as

3. *Id.* at 38 and 53; 553 P.2d at 1155 and 1165; 132 Cal. Rptr. at 683 and 693.

4. Posner, "The *DeFunis* Case and the Constitutionality of Preferential Treatment of Racial Minorities," 1974 S. Ct. Rev. 1, 12.

5. 18 Cal. 3d 34, 44; 553 P.2d 1152, 1159; 132 Cal. Rptr. 680, 687.

6. U.S. Dep't of Commerce, Bur. of the Census, 1970 Census of Population—Subject Reports—Low Income Population, 53, 61 (1973). And most members of generally disadvantaged minorities are not poor. See U.S. Dep't of Commerce, Bur. of the Census, United States Census of Population: 1970—Detailed Characteristics, Tabs. 250, 347 (1973). As Richard Posner states:

> One would, in fact expect the nonpoor members of minority groups to be overrepresented, relative to the poor of their groups, among law school and other university applicants. . ... The members of the minority group who receive preferential treatment will often be those who have not been the victims of discrimination while the nonminority people excluded because of the preference are unlikely to have perpetrated, or to have in any demonstrable sense benefitted from, the discrimination.

Posner, 1974 S. Ct. Rev. at 15, 16.

disadvantaged. Disadvantage at Davis means membership in one of a handful of racial or ethnic groups.[7] The California Supreme Court concurred with the trial court's finding that, "only minority students had been admitted under the [special admission] program since its inception, and members of the white race were barred from participation."[8] In the decision of the California Supreme Court we find that, "The University does not challenge the trial court's finding that white applicants are barred from participation in the special admission program."[9]

II.
SPECIFIC RACIAL DEFINITIONS ARE NECESSARY IN ANY PROGRAM THAT INVIDIOUSLY DISCRIMINATES ON THE BASIS OF RACE

Any applicant who designates himself a black, American Indian, Mexican-American, Asian-American, Puerto Rican, Cuban, or "Other," is "disadvantaged" under the Davis definition. In order to receive preference the applicant need not show economic or educational deprivation. Mere self-designated membership in one of the enumerated classifications entitles the applicant to assistance because it is assumed that all members of these selected races have suffered from past disadvantage,[10] and that anyone who is not a member of one of

7. For a list of the enumerated minorities see note 2, *supra*.

8. 18 Cal. 3d 34, 44; 553 P.2d 1152, 1159; 132 Cal. Rptr. 680, 687.

9. *Id.*

10. *Id.* at 52; 553 P.2d at 692; 132 Cal. Rptr. at 692. "Minority doctors will, moreover, in the opinion of the university, provide role models for younger persons in the minority community *demonstrating to them that they can overcome the residual handicaps inherent from past discrimination* (emphasis added)." *Id.* The university again assumes that all minority members suffer from "residual handicaps" because of their race and therefore asks for no proof of disadvantage to grant preference, even though extension of preference has "the effect of depriving persons who were not members of a minority group of benefits they would have otherwise enjoyed." (*Id.* at 46; 553 P.2d at 1160; 132 Cal. Rptr. at 688) This assumption should be analyzed in light of the Court's recent decision in *International Brotherhood of Teamsters v. United States*, No. 75-636 (decided May 31, 1977) in which, upon remanding the case to the district court, the Court gave instructions that for minority workers to be granted retributive seniority, "the court will have to make a substantial number of *individual determinations* in deciding which of the minority employees were actual victims of the company's discriminatory practices (emphasis added)." (at 45.)

11. Bittker, THE CASE FOR BLACK REPARATIONS, at 93 (1973).

the specified groups has not known disadvantage. Undoubtedly there are many members of each of the enumerated minorities who have disadvantaged backgrounds. These individuals who can show past disadvantage should be entitled to some preference. But Davis should not assume that none of its white applicants come from disadvantaged backgrounds. As currently constituted, the Davis program is not only unfair to majority applicants such as Allan Bakke, it is also unfair to truly disadvantaged minority applicants. If Davis can classify a black alumnus of Exeter Academy and Stanford University as disadvantaged, chances are that because of the Stanford graduate's educational background he stands a better chance of admission than a Chicano applicant from the barrio of Los Angeles who worked his way through U.C.L.A.

A. Who is Black?

"'Who is black?' A preference program such as Davis' would perforce have to rely on a set of rules in defining the class of beneficiaries . . . a program of individual reparations would require an official answer to the question, who is black?"[11] A definitive answer, while necessary, may be hard to find. Throughout most of our nation's history, the Federal government and many state governments have defined race. The reasons for the definitions vary. But they have always been at least dubious if not reprehensible. Louisiana had definitions of the terms "Negro," "mulatto," and "colored" for purposes of racial segregation *State v. Treadway*, 52 So. 500 (La. 1910). The Census Bureau regularly defined race for

polling purposes. In 1910 the census enumerators were instructed to use a visual classification, relying on their own judgment while remembering that:

> For census purposes the term "black" includes all who are evidently full-blooded Negroes, while the term "mulatto" includes all other persons having some proportion or perceptible trace of Negro blood.[12]

In 1870 the Census Bureau defined mulatto to include "quadroons, octroons, and all persons having any perceptible trace of African blood." In 1890 "black" meant "having three-fourths or more 'black blood.' "[13] The Census Bureau used many gradations in the 19th and early 20th century when counting blacks, supposedly for benign purposes. The old Jim Crow laws are grim reminders of the way in which racial definitions and classifications have been used in the past.[14] There is a well-deserved stigma attached to the idea of racial definitions. It is unfortunate, but necessary, that Davis revive the practice of racial definitions if it is to continue its admission policies. The Davis program grants a substantial advantage to certain groups at the expense of other groups. These groups must be defined. Davis has chosen to grant preference on the basis of race by defining disadvantage on racial grounds. Therefore, the races to be preferred must be defined.

The necessity for definitions is clear. We can more clearly see the problems with formulating definitions by posing some questions and proposing some answers. Are blacks individuals who have been raised in a social milieu that can somehow be defined as a black community? This would exempt blacks who lived in segregated neighborhoods. Is black only a visual

12. Dep't of Commerce, Bur. of the Census, Negro Population: 1790-1915, at 207 (1918).
13. *Id.*
14. *See generally*, C. Van Woodward, THE STRANGE CAREER OF JIM CROW, 2d ed. (Oxford, 1957).
15. Funke, "Educational Assistance and Employment Preference: Who Is an Indian?," 4 AMERICAN INDIAN L. REV. 1, 36 (1976).

characteristic? If so, individuals of black parentage who, through some genetic quirk, look white would not be eligible. Davis must answer questions like these. Allowing an applicant to define himself as a member of one of the favored groups with no questions asked guarantees problems.

B. Who Is An American Indian?

What of the term American Indian? According to Karl Funke in his article "Educational Assistance and Employment Preference: Who Is an Indian?," the Bureau of Indian Affairs (BIA) has the power to change the definition of an Indian at will.[15] Funke writes that for purposes of funding under the Johnson-O'Malley Act,[16] the BIA defines Indian as:

> [a]n individual of ¼ or more degree of Indian blood and a member of a tribe, band or other organized group of Indians, including Alaska Natives, which is recognized by the Secretary of the Interior as being eligible for Bureau of Indian Affairs services.[17]

This definition imposes a "twofold eligibility requirement of one-fourth or more Indian blood and membership in a federally recognized community of Indians."[18] Should Davis adopt the BIA's definition, Indians living outside a reservation and no longer honoring or recognizing any tribal bond, regardless of their educational or financial state, would not be eligible for preference. This could exclude many worthy American Indians. The definition of Indian found in the Interior Department's 1945 HANDBOOK OF FEDERAL INDIAN LAW is as confusing as the BIA definition:

> The term "Indian" may be used in an ethnological or in a legal sense. . . . If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not

16. 25 U.S.C. § 452 (1970).
17. Funke, at 2.
18. *Id.*

> conclusive. Legal status depends not only upon biological, but also upon social factors, as the relations of the individual concerned to a white or Indian community.[19]

In *Nofire v. United States*, 164 U.S. 657 (1897), the Court held that a white man adopted into the Cherokee nation was an Indian. Justice Cardozo, in *Morrison v. California*, 291 U.S. 82, 86 (1934), supported the idea that "not improbably" a person with Indian blood of less than one-fourth degree is to be regarded as an Indian. Davis has a number of different and difficult definitions of who is an Indian from which it can choose. Davis could formulate its own definition. But to grant preference to a group called American Indian the school must make some choice and define the term.

C. Defining Other Classifications

Davis also fails to define Mexican-American/Chicano. Posner asks of the term Chicano: "is the term meant to imply some connection with life in a barrio?"[20] Nor is Oriental/A-

19. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 2 (4th ed. 1945). *See*, L. TRUESDELL, THE INDIAN POPULATION OF THE UNITED STATES AND ALASKA, 1 (1937).

20. Posner, at 12-13. This raises an interesting point about the impact of the California Supreme Court's decision in *Bakke* on state institutions of higher learning in California. It appears that at least one professional school, Boalt Hall School of Law at the University of California, Berkeley, is possibly looking for ways to circumvent the California decision by determining the race of the applicant without actually asking the applicant's race. Boalt Hall has sent out a questionnaire that tries to establish a correlation between the answers an applicant gives to certain questions and the applicant's race. The first question is, "What is your racial or ethnic group:

__Black/Afro-American (B)
__White/Caucasian (W)
__Chicano/Mexican-American (C)
__Spanish-American/Latino (S)
__American Indian/Native American (I)
__Chinese/Chinese-American (A)
__Japanese/Japanese-American (J)
__Viet/Thai/Other Asian (V)

sian-American defined. And who is a Cuban? Is Davis giving preference to individuals from Cuba? Use of the term Cuban-American might clear up some of the vagueness, but the application simply states Cuban. Is a Cuban a person who, if not currently, at one time lived in Cuba? These terms are hard to define. But definitions are necessary to protect members of these minorities who are truly disadvantaged as well as majority applicants such as Allan Bakke. Without definitions, the minority members worthy of assistance have no protection against those who would falsify their applications in order to receive preference, much less members of their own race who are not disadvantaged. Defining disadvantage in a nonracial way, by proof of economic and educational disadvantage, would eliminate the need for racial definitions. A definition would still be needed, but such a definition would be much

__Philipino/Filipino (P)
__Korean (K)
__Polynesian (Y)
__East Indian/Pakistani (E)
_____Other (O)
__Decline to state (D)

A series of questions follow which include:

> Which of the following phrases described the neighborhood in which you lived while attending elementary school? (Check as many as apply)
>
> __Affluent
> __Middle-class
> __Poor
> __Run-down
> __Housing Project
> __A ghetto
> __Rural farm
> __Barrio
> __Suburban

As with the Davis program, no definitions are given. Individual ideas of what is "middle-class" vary greatly. Also like Davis, Berkeley's new idea rests on self-designation. It should be noted that this questionnaire which was sent out to all 1976-1977 applicants was not actually used in making admission decisions for fall 1977, though it could be used in the future. The questionnaire is reprinted in Appendix B.

less ambigious and therefore more just to both the applicants who are given preference and those who are not.

Finally, the self-designation "Other" poses many questions. The term exists for those who belong to a minority not enumerated.[21] The special admission committee does not say which minority groups are covered under the term "Other." In fact, the committee can change the definition of this term at will. What about an Italian-American? Italian-Americans can show a history of past disadvantage as a group;[22] but whites are barred from participation in the program.[23] Jews as an ethnic group can show a deplorable history of discrimination. Jews, though, are overrepresentated in medical schools in regard to their population. Jews are one group which must bear the burden of "robbing Peter to pay Paul" if the Court rules that the desire for a student body that is more representative of the nation's racial mix is a legitimate state goal that can withstand the test of strict scrutiny.

D. Self-Designation Foments Fraud

The problems with self-designation have already been mentioned. They must be stressed. Because the racial preference program increases the chances for admission of a member of one of the enumerated minorities and proportionately decreases the chances of majority applicants, it has a built-in incentive for fraud. Indeed fraud, whether intentional or not, does occur with these classifications.[24] The incentive for fraud is enhanced by the vagueness of these classifcations, which

21. 18 Cal. 3d 34, 40; 553 P.2d 1152, 1156; 132 Cal. Rptr. 680, 684.
22. *See*, The New York Times, Feb. 6, 1975 at 29, col. 5.
23. See note 6, *supra*.
24. Posner, at 13-14. *See, DiLeo v. University of Colorado*, No. 75-2280-2 (jurisdiction accepted by Colorado Supreme Court on June 3, 1976), in which an Italian-American applicant to the University of Colorado School of Law included himself in one of the preferred groups. DeLeo was accepted, but when the school found out his true ethnic background his offer of admission was withdrawn.

may itself be grounds for voiding the Davis program. This is especially true since Allan Bakke's and other nonminority applicants' constitutional right to equal protection of the laws is abridged by the special program,[25] not to mention the overbreadth of the term disadvantage as Davis uses it.[26]

III.
RACIAL CLASSIFICATIONS WITHOUT WORKABLE DEFINITIONS ARE PER SE UNCONSTITUTIONAL IF THEY INVIDIOUSLY DISCRIMINATE

Racial classifications without concrete definitions have been upheld in the past. The Court has approved, for example, racial classifications to achieve integration in public schools. But *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Lau v. Nichols*, 414 U.S. 563 (1974); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) and other cases in which racial classifications without operable definitions have been upheld:

> differ from the special admission program at Davis in at least one critical respect. . . . In none of them did the extension of a right or benefit to a minority have the effect of depriving persons who were not members of a minority group of be-

25. 18 Cal. 3d 34, 38; 553 P.2d 1152, 1155; 132 Cal. Rptr. 680, 683.
26. If the Davis program were a statutory scheme, it could fall under the void-for-vagueness doctrine. *See, Winters v. New York*, 333 U.S. 507 (1948) and *Thornhill v. Alabama*, 310 U.S. 88 (1940). Both cases invalidated state statutes for being overly vague and thus in violation of one of "the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state." (310 U.S. 88, 95) Equal protection is another one of those "fundamental rights" and was denied Allan Bakke because of the vague program of preference at Davis for the "disadvantaged." Overbreadth is tied to vagueness in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) in which another state statute is voided for these reasons. In its decision, the Court cites *Bates v. Little Rock*, 361 U.S. 516, 524 (1960): "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

nefits, which they would have otherwise enjoyed. . . . All students, whether or not they are members of a minority race, are subject to equivalent burdens.[27]

IV.
CONGRESS NEVER INTENDED THE CIVIL RIGHTS ACT OF 1964 TO SERVE AS A BASIS FOR QUOTAS AND FORCED RACIAL BALANCES

The Davis special admission program and other "affirmative action/reverse discrimination" programs grew, to a large extent, out of the Civil Rights Act of 1964.[28] There are no racial definitions in this law. The reason for this, as the legislative history indicates, is that the congressional proponents of the bill never intended such racial preference programs. In response to arguments made by Senator Lister Hill, Senator Joseph Clark, who was one of the "bipartisan captains" of Title VII of the Civil Rights Act during the Senate debate,[29] stated:

> Finally, it has been asserted that title VII would impose a requirement for "racial balance." This is incorrect. There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What

27. 18 Cal. 3d 34, 46-47; 553 P.2d 1152, 1160; 132 Cal. Rptr. 680, 688.

28. 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq*. (1970 ed. and Supp. V).

29. Senator Clark's co-captain was Senator Clifford Case.

> title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all.[30]

Other fears were quelled when Senator Clark stated:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.[31]

Senator Clark's assurances to his fellow members are compelling here. Racial preference programs which put certain racial groups and thus individuals at a disadvantage by using undefined racial classifications as the determining, or what Larry Lavinsky called the "but-for" factor in the admission of certain applicants,[32] go against the intent of Congress when it passed the 1964 Civil Rights Act. Thus, no racial definitions are given in the Act because a discriminatory program such as Davis' was not intended. From our inquiry as to the intent of the proponents of the Civil Rights Act it appears, then, that the Davis program is in violation of the Act.

CONCLUSION

The Davis program is full of good intentions. But it is backed with too little specificity and logic. Many minority students deserve special scrutiny when applying to medical school because of past disadvantage. Many white students,

30. 110 CONG. REC. 7207 (1964).

31. *Id*. at 7213.

32. L. Lavinsky, "*DeFunis v. Odegaard*: The "Non-Decision With a Message," 75 COL. L. REV. 520, 522 (1975).

however, also deserve special consideration. Currently, the Davis program unjustifiably gives preference to all applicants from certain minority groups at the expense of other minority groups such as Hungarian-Americans and Polish-Americans. This discrimination satisfies no compelling state interest.

The special admission program should not be scrapped; it should be altered. It should be narrowed in some respects to exclude those minority applicants who have no right to preference. This would increase the chances of admission of the genuinely needy minority applicants. It should also be broadened to include individual applicants from all racial and ethnic backgrounds who have made their way through college only by a great deal of stamina and perserverance. These applicants should be given preference. They have earned it. Race would make no difference in such a program. Determination and hard work would be the basis for eligibility. These are the qualities that a preferential admission program for the disadvantaged should reward. These qualities recognize no racial distinctions. This is the type of program that the Court should recommend for Davis.

Respectfully submitted,
Daniel T. Spitler
131 E. Court St.
Bowling Green, OH 43402
Counsel for the *Amicus Curiae*

APPENDIX A

Reprinted from The New York Times, Mar. 29, 1977 at 30, col. 4.

To the Editor:

Anthony Lewis's March 13 Week in Review article, "Racial Quotas Will Come Again Before High Court," says that those who oppose preferential admissions programs in law and medical schools do so because they fear that such programs "will wound society." This is quite an understatement.

The problem which opponents of preferential admissions have is unlearning the great decisions of the Supreme Court of the last quarter century which have told us, as Prof. Philip Kurland has said, that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society." "Now," he continued, "we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored."

Racially segregated admissions policies are as vulnerable to the command of the equal protection clause as segregated schoolrooms.

Quota systems are inescapable in preferential admissions. Such programs are not benign in respect to those who are denied admission to professional school because of their race. In setting aside 16 of 100 available places for minority students and comparing minority applicants only with each other and not with the entire applicant pool, a quota is established. In allowing this quota to be filled by students with grade point averages as low as 2.11 and Medical College Admission Test scores in *every* instance below the 50th percentile of the national average in the two years in which Allan Bakke applied to Davis, while summarily rejecting all white applicants with grade point averages below 3.5,* invidious discrimination is being practiced. As Justice Brennan points out in the Brooklyn redistricting case, ". . . what is presented as benign race assignment in fact may prove to be otherwise."

But the redistricting case to which Lewis refers is not relevant to *Bakke* for the very reason that the latter, unlike the former, does not concern benign discrimination. Invidious discrimination—the denial of a benefit or right on the basis of race—is present in *Bakke*. In the redistricting case, the right of each member of the Hasidic community to vote is still intact.

---

* MCAT scores among the special admits *averaged* below the 50th percentile. While applicants were summarily rejected if their G.P.A. was below 2.5, not 3.5.

Justice Brennan and former Justice Douglas knew that the issue of preferential admissions to professional schools was ripe for decision three years ago when the high court refused to render a decision in the DeFunis case. I do not want the state professional schools to "experiment" anymore. I refuse to believe that I should have to suffer a burden as great as possible denial of admission to law school for past racial discrimination I did not commit.

TIM HOY
Oberlin, Ohio, March 22, 1977

APPENDIX B

Questionnaire from the Boalt Hall School of Law, University of California, Berkeley, Berkeley, CA 94720

April 8, 1977

MEMORANDUM

To: 1976-1977 Applicants
From: Boalt Hall Faculty-Student Task Force on Admissions

Depending on the outcome of pending litigation, the School of Law of the University of California at Berkeley may be obliged to modify its admissions practices. A possible modification under consideration is a program giving weight in the admissions process to disadvantage of a kind which might otherwise impair an applicant's chance of admission. In order to estimate the feasibility and the consequences of such a program the School needs a good deal of information which it does not presently have. We are requesting current applicants for admission to complete and return the attached questionnaire for the assistance the information will provide on such topics as appropriate criteria of disadvantage, the effects on admissions outcomes of a disadvantaged program and its design and administration.

The questionnaire asks for your name. This is because it may prove helpful in carrying out the study to combine data in the responses to the questionnaire with information in applications. Once our study is completed, responses to questions which identify individuals will be separated from the questionnaires and destroyed. All individually identifying data will be held in confidence.

We will not use the questionnaire in making admissions decisions for Fall, 1977, and, if we have not yet acted on your application,

your response to the questionnaire will not be part of the file considered in our admissions process. In no event is any applicant required to complete and return the questionnaire. Whether you reply or not will not enter in any way into a decision on your application. Of course, a high rate of return of the questionnaire will maximize the usefulness of the study, and we are therefore most grateful to applicants who take the trouble to respond, whether or not you have heard from us on your application.

Please send replies in the enclosed postage paid envelope *by April 22*, 1977, to Admissions Office, Boalt Hall, University of California, Berkeley, California, 94720. We thank you in advance for your participation.

University of California at Berkeley 1976-1977
School of Law

1. Name_____
   last first middle
2. What is your racial or ethnic group:
   __Black/Afro-American (B)
   __White/Caucasian (W)
   __Chicano/Mexican-American (C)
   __Spanish American/Latino (S)
   __American Indian/Native American (I)
   __Chinese/Chinese-American (A)
   __Japanese/Japanese-American (J)
   __Viet/Thai/Other Asian (V)
   __Philipino/Filipino (P)
   __Korean (K)
   __Polynesian (Y)
   __East Indian/Pakistani (E)
   _____Other (O)
   __Decline to state (D)
3. What was your first language?_____
4. How frequently was English spoken in your home while you were young?
   __Always or nearly always
   __Most of the time
   __About half of the time
   __Less than half of the time
   __Rarely or never

5. How many siblings do you have?_____
6. When you were in high school, which of the following persons lived in your home? (Check as many as apply.)
   __Your real mother
   __Your stepmother, foster mother, or other female guardian
   __Your real father
   __Your stepfather, foster father, or other male guardian
   __One or more uncles or aunts
   __One or more grandparents
   __Other adult relative(s)
   __Other unrelated adult(s)
7. Please give your residence address, including zip code, during the period you attended high school.

   _____

   _____

   When answering the following questions about your parents, please respond regarding step-parents, foster parents, or guardians if you were not living with your real parents when in high school.
8. What was your father's occupation? (Please give both a job title and a brief description of his work. If he had more than one occupation, indicate his main source of earned income during your high school years.)

   _____

   _____
9. What was your mother's occupation?

   _____

   _____
10. In which of the following areas of law would you prefer to practice? Please rank your first three choices in order of preference.
    __Civil Litigation
    __Corporate Practice
    __Criminal Law
    __Domestic Relations/Family Law
    __Environmental Protection
    __International Relations
    __Labor Relations
    __Service to Low Income and Minority Communities.
    __Sex Discrimination
    __Tax and Probate
    __Other (Please describe)

11. What is the highest level of formal education completed by each of the following persons? (Please respond by entering one of these code numbers on the line before each indicated person.)
    0 Do not know, or does not apply
    1 None, or some grade school
    2 Finished grade school (six years)
    3 Some junior or senior high school
    4 Finished high school
    5 Some college or junior college
    6 Bachelor's degree
    7 Some graduate work
    8 Master's degree
    9 Ph.D. or professional degree
    __Your father
    __Your mother
    __Your best friend when you were in high school
    __The oldest of your brothers, if any
    __The oldest of your sisters, if any
12. About how much was your family's total annual household income (from all sources and before taxes) as best you can recall or estimate? (Please use these code numbers to respond.)
    0 I don't know, even approximately
    1 Under $2,000
    2 $2,000-$3,999
    3 $4,000-$5,999
    4 $6,000-$7,999
    5 $8,000-$11,999
    6 $12,000-$15,999
    7 $16,000-$19,999
    8 $20,000-$23,999
    9 $24,000 or more
    __When you were in the sixth grade
    __ When you were in the ninth grade
    __When you were in the twelfth grade
13. Did your parents receive any form of governmental assistance while you were living at home with them? (*E.g.*, AFDC, general assistance, Medi-Cal, unemployment compensation.)
    __No
    __Less than one year

__1-3 years
__4-6 years
__7 years or more

14. Were you a recipient of financial aid as an undergraduate and/or graduate student?
    __Basic Educational Opportunity Grant
    __California Opportunity Grant
    __Work Study
    __National Defense Student Loan
    __Other grants of fellowships
    What is your present level of college-related indebtedness?_____

15. The following set of questions are about your recollections of your classmates when you were a student in high school. (Please use these code numbers to respond to these questions.)
    0 I don't know
    1 All, or almost all
    2 More than one-half
    3 About one-half
    4 Fewer than one-half
    5 None, or almost none
    __How many of your classmates wanted to go to college?
    __How many of your classmates actually did enroll in college?
    __How many of your personal high school friends enrolled in college?
    __How many of your high school classmates were white ("Anglo")?

16. Which of the following phrases described the neighborhood in which you lived while attending elementary school? (Check as many as apply.)
    __Affluent
    __Middle-class
    __Poor
    __Run-down
    __Housing project
    __A ghetto
    __Rural farm
    __Barrio
    __Suburban

Indicate any other respects in which you felt disadvantaged or handicapped in comparison with other students.

_____
_____
_____
_____
_____